88-58

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

CHARLES FULTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

I. Whether the Petitioner was denied a fair trial due to the government's failure to preserve and produce original and rough notes of testifying witnesses.

II. Whether, after the Petitioner had raised the possibility of a conflict of interest between his attorney and himself, the trial court erred in neither allowing defendant to obtain new counsel nor fairly ascertaining whether an actual conflict of interest existed.

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PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

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OPINION BELOW

The Petitioner was convicted after a jury trial before the United States District Court for the Eastern District of New York, Honorable I. Leo Glasser, presiding. On April 12, 1988, the judgment of conviction was affirmed by the

United States Court of Appeals for the Second Circuit. A copy of the written opinion is attached hereto as Appendix A.

JURISDICTION

The judgment denying the Petitioner's appeal of their conviction was affirmed by the United States Court of Appeals for the Second Circuit on April 12, 1988. (Appendix A). Jurisdiction to review the judgment of the Court of Appeals by writ of certiorari is conferred on this Court by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

18 U.S.C. § 3500 Demands for production of statements and reports of witnesses.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter

defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

STATEMENT OF THE CASE

INTRODUCTION

Petitioner CHARLES FULTON was charged in an eight count indictment with participating in a narcotics conspiracy and with possession with intent to distribute narcotics between April, 1985 and April, 1987. Petitioner was arrested at the home of his co-defendant, Delgit Batra, on April 13, 1987.

He thereafter appeared in the District Court and entered a plea of not guilty.

The matter was referred to the Honorable I. Leo Glasser, United States District Judge for the Eastern District of New York. The trial commenced on September 9, 1987, and concluded on September 15, 1987, when the jury returned verdicts of guilty on all counts charged in the indictment.

PRE-TRIAL CONFERENCE

On Friday, September 4, 1987, less than a week before his trial was to commence, the Petitioner was arraigned on a superseding indictment which added a new count of possession of the heroin recovered in Delgit Batra's apartment, and which omitted Delgit Batra as a co-defendant. The Petitioner's trial counsel then advised the court that this indictment represented a significant departure from the charges previously faced by his client and requested a continuance.

Thereafter, apparently for the first time, the court was advised of a possible conflict of interest on the part of trial counsel. At that time, the following colloquy took place:

> Ms. Kenner: There is one more matter that I would like to bring to the Court's attention, particularly since Mr. Fulton is about to consult alternate counsel, a piece of evidence.
>
> The Court: I want to make it very clear that I am not going to adjourn this case beyond Wednesday morning.
>
> Ms. Kenner: I just want to know.
>
> The Court: It is kind of late in the day to be changing lawyers.
>
> Ms. Kenner: There is one piece of evidence that was seized from Mr. Fulton, or in the presence of Mr. Fulton at the time of his arrest, it was the daily calendar. In the calendar, there is a notation of a loan from Mr. Fulton to Mr. Port's son.
>
> Mr. Port has asked that the reference be redacted from the daily calendar in the event that the government intends to admit this calendar in evidence. I have

> acceded to that request, but I have indicated to Mr. Port that I think it is advisable that we notify the Court of this redaction, and that the defendant be advised by...also about his right to be represented by an attorney without conflict of interest, and that he represent on his... on the record for his own and our protection, with the representation he has been receiving at the time of his trail...
>
> Mr. Port: I think, for the record, what is indicated is that my son came. Mr. Fulton asked in my office and found he was going to an auction for audio equipment, and went there that day, and said he was in a hurry, and said if you see something good, buy it for me, handed my son money in an envelope.
>
> My son felt very ill at ease with it, never used it, and turned it back.

Thereafter, Petitioner said to the court:

> I would like to indicate that I am dismissing Mr. Port as my attorney and will seek other counsel (Ap.14_a).

Petitioner then said:

> I feel that, based on...from the inception of the case, of it, up until today when Ms.

> Kenner...U.S. Attorney first indicated to Mr. Port that his son would be placed in the in the involvement, from that point up until today, I feel there has been swaying or a swaying of his decisions to consult me, and therefore, I feel that the issue developed a conflict of interest between my attorney and myself.

On Wednesday, September 9, 1987, the day trial was to commence, Petitioner appeared in court and advised the judge, through his attorney, that he had not changed his view, but would abide by the "directive" of the court to proceed to trial (Tr. 2).

THE GOVERNMENT'S CASE

The government presented a total of eight witnesses during the trial: five agents assigned to the Drug Enforcement Administration, a confidential informant cooperating with the government, a document examiner; and a Punjabi interpreter.

On cross-examination of the government's first witness, trial counsel established that Ashok Kumar Malik, a confidential informant, original notes relative to his discussions with government agents during the debriefing were sent back to the Federal Prison Camp in Danbury, Connecticut. (Tr. 120). The notes were written in Mr. Malik's own shorthand, indicating the number of kilos, the approximate month that they came in, the time and the partners, and the monetary values. (Tr. 121). At side bar, counsel requested that the government be directed to have the material produced, since it was only two hours away and the trial was scheduled to adjourn for approximately two hours shortly. This application was denied, and the Petitioner was required to continue cross-examination with the photocopy of what the witness

described as his written notes regarding heroin transactions he entered into.

The last witness called by the government was Lori Butler of the Drug Enforcement Administration. Agent Butler testified that she met Mr. Malik approximately ten times from October, 1986, to March, 1987 (Tr. 412). She asserted that, during these debriefing meetings, Malik mentioned Petitioner as being involved in drug transactions (Tr. 414). Although she met Malik ten times, she prepared no debriefing report (Tr. 414). On cross-examination, she admitted taking approximately 20 pages of notes, but claims she misplaced them (Tr. 418). The witness denied the notes were gone, but just that she was unable to locate them (Tr. 422).

THE VERDICT AND SENTENCE

On September 15, 1987, after approximately four hours of deliberation, the jury returned its verdict of guilty against the Petitioner on all counts of the indictment.

On November 24, 1987, the Petitioner was sentenced to a 20 year term of imprisonment on counts 1 through 7, to be served concurrently, and a $700,000.00 fine. On Count 8, the Petitioner was sentenced to a two year term of imprisonment.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS INTERPRETATION AND APPLICATION OF THE JENCKS ACT, 18 U.S.C. §3500, IS IN CONFLICT WITH ESTABLISHED PRECEDENT.

On appeal, the Petitioner asserted that he was deprived of a fair trial by the government's failure to preserve and produce prior statements of its witnesses as required by the Jencks Act, 18 U.S.C. §3500. More specifically, D.E.A. agent Lori Butler had prepared approximately 20 pages of handwritten notes during her debriefing sessions with the confidential informant, Ashok Kumar Malik. And Malik, pursuant to the instructions from Butler, had written notes to himself in order to refresh his memory prior to each debriefing session. Trial counsel for the Petitioner had requested production of Jencks Act, as well as all Brady and Giglio material, through an omnibus

discovery motion. A supplemental request for Malik's original notes was made at trial.

The trial court's refusal to order production of either Butler's or Malik's original notes was affirmed by the Second Circuit. In its opinion, the court, relying on United States v. Gotchis, 803 F.2d 74 (2nd Cir. 1986), and United States v. Sanchez, 635 F.2d 47 (2nd Cir. 1980), stated that the government was not required to provide the Petitioner with originals since photocopies of the notes had been provided, nor was the government required to preserve or turn over the notes made by government agents as contrasted with those made by the witness to the events. (See Appendix A).

This holding by the panel of the Second Circuit does not follow established precedent in either the second or ninth circuits. The Gotchis court summarized

the application of the Jencks Act and its parallel provision in the Federal Rules of Criminal Procedure, Rule 26.2(a). Essentially, a written statement made by a witness that is signed or otherwise adopted or approved by him is to be produced if the statement is in witness's possession and concerns a subject matter about which the witness has testified. In the event that the government fails to comply with a court order to produce the prior statement of a witness, the court shall declare a mistrial if required by interest of justice. 803 F.2d at 77.

In Gotchis, the prior statement in question was deemed not to be one made by the witness or adopted by him. The testifying witness was a D.E.A. agent who received information from another regarding the description of a drug courier. When the receiving agent testified at trial, the defendant demanded

to see the agent's notes that included a description of the courier. The court reviewed the testifying agent's notes as being a statement of the other agent and therefore not one that had to be produced. The court went on to distinguish the Gotchis fact situation from that and Sanchez. In Sanchez, an informant's notes prepared for an agent were producible. Such reports are vital to test a witness's recollection or undermine his credibility. Unlike a law enforcement agent who need not retain rough notes after reducing them to a formal report, a lay witness's prior written statements must be preserved and produced under Jencks, Sanchez, 635 F.2d at 66.

The Ninth Circuit draws a distinction between an agent's rough notes based on an interview of a witness relating activities and notes regarding surveillance by an agent of another's activities. In the

former situation, rough notes do not have to be preserved. However, an agent's original interview notes of a suspect or witness must be preserved and produced. United States v. Andersson, 813 F.2d 1450 (9th Cir. 1987). See also United States v. Harris, 543 F.2d 1247 (9th Cir. 1976).

Agent Butler had prepared rough notes of her debriefing sessions with Malik. She was taking notes,

> because each time we did debrief him, we would go over and over his story and each time there might be a little bit more information that he would remember because we were talking about maybe a year and a half of his activities, so naturally he didn't remember everything. (Tr. 418)

These notes were not made expendable by virtue of the formal DEA-6 report prepared later by Butler and her co-agent. See United States v. Andersson.

Similarly, handwritten notes of Malik should have been preserved and produced. Malik wrote these notes at the direction

of Agent Butler who asked him to make some notes in the bullpen before coming to see them, so that he could collect and get the time of these transactions correct. (Tr. 120). The government had the originals in its possession as testified by Malik who said

> when I came from Danbury I brought my legal file with me and I had this piece of paper with me during the time that I was interviewed by the agents...it was sent back to Danbury when I was sent back to Danbury. I believe the prosecutor or one of the agents kept a copy of that piece of paper. (Tr. 120).

Trial counsel for the Petitioner made a specific request for the original notes at the time of trial. The trial court denied any continuance and relied on the governments assertion that all of the Jencks Act material had been turned over to the Petitioner.

The production of photocopies of handwritten notes and the bald

assertion by the government that all relevant documents had been turned over is not sufficient to satisfy the requirements of the Jencks Act. The proper procedure is for the court to conduct an in camera examination of the reports to determine whether there is any statement that is producible. A trial court's acceptance of the government's representations is not adequate compliance with the requirements of the Jencks Act. United States v. Welch, 810 F.2d 485 (5th Cir. 1987); United States v. Allen, 798 F.2d 985 (7th Cir. 1986).

The error caused by the failure to produce statements which the government had a duty to preserve is not a harmless one. Since there is no alternative means of obtaining the documents in question, this case is distinguishable from Rosenberg v. United States, 360 U.S. 367 (1959). A court should not guess what a

defendant's attorney might have found useful for impeachment purposes in withheld documents to which the defense is entitled. Killian v. United States, 368 U.S. 231 (1961).

The government's failure to preserve the handwritten notes of agent Butler and Malik is a violation of the Jencks Act and F.R.C.P., Rule 26.2(a). Reversal of the conviction is necessitated on account of the Petitioner's inability to conduct a full and sifting cross-examination of the government witnesses and elicit all relevant testimony to his defense.

II. THE DEFENDANT WAS DENIED A FAIR TRIAL DUE TO TRIAL COURT'S FAILURE TO HOLD A CONFLICT OF INTEREST HEARING

A. The Second Circuit Misinterpreted Prior Supreme Court Decisions Concerning Attorney Conflicts Of Interest

Petitioner Fulton was denied his sixth amendment right to effective assistance of counsel due to the failure of the trial

court to hold a hearing to determine whether a possible conflict of interest between the Petitioner and counsel was an actual conflict. The issue is one of supreme importance: "Conflicts of interest necessarily implicate breach of counsel's duty of loyalty, which is 'perhaps the most basic of counsel's duties.' Strickland v. Washington, [466 U.S. 668, 692 (1984)." Whiteside v. Scurr, 744 F.2d 1323, 1330 (8th Cir. 1984). The attorney's role is to represent the interests of his client. When other interests become involved, the potential for misrepresentation increases.

In three recent cases the Court has confronted the question of attorney conflict of interest. Wood v. Georgia, 450 U.S. 261 (1980); Cuyler v. Sullivan, 446 U.S. 335 (1980); Holloway v. Arkansas, 435 U.S. 475 (1978). Taken together, these cases stand for the proposition that when

a possible conflict of interest is brought to the attention of the trial court, the court must either hold a hearing to determine whether there is an actual conflict of interest, or grant the motion asking for removal of counsel.

In the instant case the Petitioner objected before trial to his attorney's conflict of interest, and requested new counsel. The trial court denied the motion without holding a hearing, and the Second Circuit affirmed. Both the unpublished opinion and the government's reply brief to the original appeal conclude that a movant asking for new counsel must prove an actual conflict of interest without benefit of a hearing to develop a factual basis. Assuming, for the sake of argument, that they correctly stated the law as reflected in the opinions of the Second Circuit, it is not

a correct statement of the law as propounded by the Court.

In Holloway and Cuyler the conflict of interest issue arose in the context of joint representation of criminal defendants. In Holloway a public defender assigned to represent three codefendants at the same trial moved for appointment of separate counsel. The motion was denied by the trial court, and the denial was affirmed by the Supreme Court of Arkansas. This court reversed and remanded, holding that upon receiving notice of a possible conflict of interest, the trial court had a duty to "appoint separate counsel or to take adequate steps to ascertain whether the risk was to[o] remote to warrant separate counsel." 435 U.S. at 484. According to the Court, the trial court should refrain from allowing any conflicting interest to interfere with counsel's representation. 435 U.S. at 485.

In Cuyler the defendant's attorney represented codefendants at a later trial, where they were acquitted. The defendant appealed on the grounds that their later representation of the codefendant constituted a conflict of interest. The Court carefully pointed out that it was reviewing only two issues: whether a state trial judge must inquire into a conflict of interest even though it is not mentioned at trial, and whether the mere possibility of a conflict requires a conclusion of constitutional deprivation. 446 F.2d at 345. The Court concluded that without an objection at trial an actual conflict must be shown in order to obtain relief. 446 F.2d at 349. But the Court reaffirmed Holloway's crucial additional requirement not mentioned by the government or the circuit court. It held that when an objection suggesting a possibility of a conflict of interest was

raised, the defendant "must have the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial." 446 F.2d at 348.

In Wood this reasoning was applied to facts similar to those of the instant case. There employees of an illegal movie-house and bookstore were represented at court by an attorney apparently financed by their employer. Although new counsel was requested at the hearing, defendant's motion was denied without any opportunity to present evidence or make a reasoned argument. The Court recognized the possibility that the employer might have a different agenda than his employees, stating, "the possibility of a conflict of interest was sufficiently apparent at the time of the [parole] revocation hearing to impose upon the court a duty to inquire further." 450 U.S. at 272. Unlike Holloway and Cuyler, the

conflict in Wood was between the attorney and the defendants, not between codefendants. Similarly, the conflict in the instant case is between the attorney and the Petitioner.

In the instant case the possible conflict resulted from a loan made by the Petitioner to his counsel's son. The few facts elicited at trial show that the son's name appeared in a book allegedly containing drug transactions. Counsel requested that the reference to his son be redacted and did not refer to it on cross-examination. Petitioner suggested that this hindered counsel's representation of him as he did not want to involve his son in the drug trial. Petitioner requested new counsel. The trial court failed to hold any sort of hearing, or allow the introduction of any evidence pertaining to the question. It is clear that for the hearing more is required than the court

entertaining counsel's or defendant's thoughts on the subject of conflict. In Holloway, the Court found that the defendant was denied a hearing because his counsel was not allowed to make anything other than "conclusory representations" to the trial court. 435 U.S. at 484, n. 7. Obviously, this hearing should produce evidence as to the alleged conflict. In the instant case, the Petitioner, without assistance from his counsel, attempted to demonstrate to the court that a conflict existed. But in the absence of an evidentiary hearing or the cooperation of counsel, he was not allowed to make his case.

An Alabama case demonstrates how attorney-client conflicts can pervert the entire system. In that case the attorney, having trouble obtaining his fee, took two courses of action. First, he suggested to the prosecutor that his client be

reindicted on more serious charges so that the attorney had more leverage to obtain his fee. Second, he suggested to his client that he participate in the attorney's drug scheme. The defendant went directly to the DEA, which enlisted him as an undercover agent. He was subsequently convicted, and then testified against the attorney at the attorney's trial. Messelt v. State of Alabama, 595 F.2d 247 (5th Cir. 1979). The circuit court reversed and remanded the conviction as shocking to their judicial conscience. Id. at 251. The defendant in Messelt made no motion. If he had, presumably the attorney would have done everything in his power to stop the trial court from learning of his actions. A colloquy between the attorney and the trial judge would not have revealed the conflict of interest. Rather, a hearing would be the only forum for the judge to ascertain the

actual conflict of interest. In this case the attorney did not counsel his client correctly. In most cases involving a conflict of interest between attorney and client, representation will also be deficient.

In contravention of Supreme Court precedent, the Petitioner was denied a hearing to determine whether an actual conflict of interest existed. Here the Petitioner's counsel was apparently worried that a member of his family would become involved in the trial. It is possible that he could protect his family and still provide adequate counsel. But without a hearing no conclusion can be drawn.

B. A Conflict Exists Among The Circuit Courts On Whether A Hearing On Conflict Of Interest Is Required

Even if the Court's rulings do not extend to this issue, the Petitioner's

case is ripe for review because the various circuits are split on the question of whether a hearing is required upon notice of a possibility of a conflict. According to the unpublished opinion of the Second Circuit panel, Cuyler only stands for the proposition that an actual conflict of issue must be shown. If that is a correct statement of Second Circuit law, then the Second Circuit is practically alone among circuits in its position.

The majority of circuits which have approached this issue interpret the Supreme Court cases to require, upon a motion requesting new counsel due to a conflict of interest, that the trial court either grant the motion or hold a hearing to determine whether an actual conflict of interest exists. Government of Virgin Islands v. Zepp, 748 F.2d 125, 139 (3rd Cir. 1984); United States v. Young, 644

F.2d 1008, 1011-1012 (4th Cir. 1981); United States v. Punch, 722 F.2d 146, 151 (5th Cir. 1983); United States v. Horton, 845 F.2d 1414, 1418 (7th Cir. 1988); United States v. Morando, 628 F.2d 535, 536 (9th Cir. 1980); United States v. Dressel, 742 F.2d 1256, 1258 (10th Cir. 1984). Other circuits seem to follow the stand of the second circuit. Wilson v. Mintzes, 761 F.2d 275, 290-291 (6th Cir. 1985); United States v. Shaughnessy, 782 F.2d 118, 120 (8th Cir. 1986).

The decision of the Second Circuit conflicts with the decisions of at least six other circuits. This type of conflict requires Supreme Court adjudication to guarantee justice among all circuits. Sup. Ct. R. 17.1(a).

CONCLUSION

Wherefore, Petitioner respectfully requests that the Court grant this petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit. The Court of Appeals incorrectly applied law in affirming the conviction. Even if it correctly applied Second Circuit law, other circuits are in direct conflict, a situation which only the Court can resolve.

This the 8TH day of July, 1988.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 87-1512
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
CHARLES FULTON
Defendant-Appellant.

BEFORE: HONORABLE WILLIAM H. TIMBERS,
Circuit Judge,
HONORABLE AMALYA L. KEARSE,
Circuit Judge,
HONORABLE LEONARD D. WEXLER,
District Judge

COUNSEL

Andrew J. Maloney
John Gleeson
Anne E. Kenner, for the plaintiff-appellee
David W. Schmidt, for the defendant-appellant

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern

District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Defendant Charles Fulton appeals from a final judgment of the United States District Court for the Eastern District of New York, following a jury trial before I. Leo Glasser, Judge, convicting him on one count of conspiracy to distribute more than one kilogram of heroin, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A)(i); five counts of possessing heroin with intent to distribute it, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 841(b)(1)(A)(i); one count of attempting to possess with intent to distribute more than one kilogram of heroin, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A)(i); and one count of possessing cocaine, in

violation of 21 U.S.C. § 844. Fulton was sentenced to concurrent 20-year prison terms on the conspiracy, attempt, and heroin possession counts, and a concurrent two-year prison term on the cocaine possession count; he was assessed fines totaling $710,000 and special assessments totaling $400. On appeal, he contends principally that there was not probable cause for his arrest and that documents seized in connection with that arrest should have been suppressed; that he was denied his Sixth Amendment right to the effective assistance of counsel because his attorney had a conflict of interest; and that he was deprived of a fair trial by the government's failure to turn over Jencks Act materials and by a witness's mention of Fulton's past criminal history. Finding no merit in any of his contentions, we affirm the judgment.

The contention that the law enforcement agents lacked probable cause to arrest Fulton has no merit. The agents had been informed by a cooperating witness that the witness was to deliver five kilograms of heroin to the apartment of Delgit Batra and that a black man would be at Batra's apartment to receive the heroin. When the agents observed the informant hand Batra the bag that supposedly contained the heroin, they entered and arrested Batra. In the apartment they found Fulton, a black man, seated on a couch, virtually surrounded with narcotics paraphernalia including a scale, plastic bags, color coded tags, and narcotics records. These facts were sufficient to "warrant a prudent man in believing that (Fulton) had committed or was committing an offense." Beck v. Ohio, 379 U.S. 89, 91 (1964); United States v.

Torres, 740 F.2d 122, 128 (2d Cir.), cert. denied, 471 U.S. 1055 (1985).

The district court determined that the search of Fulton's bag was not unlawful because it was performed incident to a lawful arrest and because Fulton consented to the search. Fulton, though handcuffed, remained within five feet of the bag, and it was appropriate for the agents to search the bag for security reasons in connection with his arrest. Further, the district court's finding, after hearing the government's evidence at the suppression hearing, that Fulton voluntarily consented to the search is not clearly erroneous, and thus may not be set aside. See United States v. Puglisi, 790 F. 2d 240, 244 (2d Cir.) (per Curiam), cert. denied, 107 S. Ct. 106 (1986); United States v. Sanchez, 635 F.2d 47, 58-61 (2d Cir. 1980).

We find unpersuasive Fulton's contention that he was denied the effective assistance of counsel by a conflict of interest on the part of his attorney. "In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 350 (1980). The district court correctly determined that Fulton had failed to show any actual conflict of interest. Moreover, the redaction of the calendar to remove the name of counsel's son as a person to whom Fulton had loaned money removed any appearance of conflict. Finally, Fulton's contention that counsel could not effectively cross-examine the government's expert witness because of the calendar notation regarding the son is belied by (1) the fact that the calendar

was not mentioned by the witness, (2) the lack of relevance of the loan to any issue of narcotics dealing, and (3) the vigorous cross-examination of the witness by counsel on the matters to which he did testify.

Fulton's Jencks Act contentions, see 18 U.S.C. § 3500, are without merit. Xerox copies of the notes made by the witness had been provided to Fulton. The government was not required to provide him with the originals, which were not requested at trial. Nor was the government required to preserve or turn over the notes made by government agents, as contrasted with those made by the witness to the events. See Gotchis, 803 F.2d at 78; Sanchez, 635 F.2d at 66 n.20.

Finally, we reject Fulton's argument that he is entitled to a new trial because of references at trial to his criminal history. Assuming, without deciding, that

Fulton's past criminal record was not admissible at trial, the intrusions on Fulton's rights were inadvertent and harmless. The prosecutor's reference in her opening statement to Fulton's having "got(ten) caught" plainly was not a reference to his 15-year-old conviction, for she referred to transactions "as early as April of 1985." While the phrase "got caught" was inapposite to April probation or parole was made by a witness in a statement that was not responsive to the government's question, and the court immediately gave the jury an instruction to disregard the statement. Given the very limited references and the overwhelming evidence against Fulton, we find no basis for reversal. See United States v. Rivera, 496 F.2d 952, 954 (2d Cir. 1974).

We have considered all of Fulton's

arguments on this appeal and have found them to be without merit.

The judgment of conviction is affirmed.

CERTIFICATE OF SERVICE

This is to certify that I have served a true and correct copy of the foregoing document upon all parties by depositing a copy of the same in the United States Mail with First Class postage prepaid.

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This the 11th day of July, 1988.

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SUPREME COURT, U.S.
FILED
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(2)

No. 88-58

In the Supreme Court of the United States

OCTOBER TERM, 1988

CHARLES FULTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner is entitled to a new trial because the government allegedly violated the Jencks Act, 18 U.S.C. 3500.

2. Whether petitioner's counsel had a conflict of interest that impaired his representation of petitioner.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1988. On June 3, 1988, Justice Marshall extended the time for filing a petition for a writ of certiorari to July 11, 1988, and the petition was filed on July 9, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of conspiring to possess more than

one kilogram of heroin with intent to distribute it (21 U.S.C. 841(a) and 846), five counts of possessing heroin with intent to distribute it (21 U.S.C. 841(a)(1)), one count of attempting to possess more than one kilogram of heroin with intent to distribute it (21 U.S.C. 846), and one count of possessing cocaine (21 U.S.C. 844). Petitioner was sentenced to concurrent 20-year terms of imprisonment on the conspiracy and heroin possession counts, as well as a concurrent two-year term of imprisonment on the cocaine count. Petitioner was also fined $710,000. Pet. App. 2a-3a.

1. The evidence at trial showed that petitioner was involved over a two-year period in five large heroin transactions (Tr. 41-81, 219-260). During part of that period, between June 1985 and February 1986, petitioner received a total of 18 kilograms of heroin. Petitioner was arrested on April 13, 1987, when agents of the Drug Enforcement Administration accompanied petitioner's supplier to an apartment where petitioner and his accomplice hoped to buy five kilograms of heroin. After arresting petitioner, the agents found two and one-half kilograms of heroin hidden in the apartment. *Id.* at 229-234, 243-260.

2. Before trial, petitioner was arraigned on an eight-count superseding indictment. At that time, the prosecutor brought to the district court's attention the fact that petitioner's personal calendar, which was seized at the time of his arrest, contained a notation of a loan from petitioner to the son of petitioner's counsel (C.A. App. 13a). The prosecutor told the court that she would agree to redact that notation in the event that the calendar was introduced into evidence (*ibid.*).[1] The prosecutor said: "I think it is

[1] At trial, the district court admitted into evidence only three pages of petitioner's calendar; those pages did not include the reference to counsel's son (Tr. 251).

advisable that we notify the Court of this redaction, and that the defendant be advised * * * about his right to be represented by an attorney without conflict of interest" (*ibid.*). Petitioner's counsel then explained that petitioner gave counsel's son the money to buy audio equipment for petitioner at an auction. Petitioner's counsel stated: "My son felt very ill at ease with it and turned it – never used it, and turned it back" (*id.* at 14a).

Petitioner then addressed the court and stated (C.A. App. 14a):

> I verify that that is what happened and * * * I do find some things in conflict of interest and * * * I am dismissing Mr. Port as my attorney and will seek other counsel.

The court then asked petitioner: "What is this conflict of interest?" (*ibid.*). Petitioner responded: "The conflict of interest of what the item that [the prosecutor] just spoke of" (*ibid.*). The court then asked: "How does that give rise to a conflict of interest?" (*ibid.*). Petitioner responded that his lawyer's description of the "loan" was accurate, but petitioner added: "I feel that there has been swaying or a swaying of [my attorney's] decisions to consult me and therefore, I feel that the issue developed a conflict of interest between my attorney and myself" (*id.* at 15a). The prosecutor and petitioner's counsel then told the court that they did not see any conflict of interest. The district court agreed and stated: "I don't see any conflict of interest at all" (*id.* at 16a). When the trial commenced five days later, petitioner's counsel told the district court that "[t]he defendant has not changed his views" but that "he has not hired anyone else * * * " (Tr. 2).

3. At trial, Ashok Malik testified about petitioner's role in four large heroin transactions. On cross-examination, Malik, who testified under a cooperation agreement

with the government, discussed his meetings with DEA agents. He stated that "there were quite a few debriefing meetings" from October 1986 through June 1987 (Tr. 91, 156). In preparing for those meetings, Malik made "some notes in the bullpen before coming to see [the agents] * * * so that [he] could collect and get the time of these [drug] transactions" (Tr. 120). The government gave petitioner's counsel a photocopy of Malik's notes (Pet. App. 7a).

Special Agent Lori Butler was one of the DEA agents who interviewed Malik (Tr. 412). Butler met with Malik at least ten times before she left on maternity leave in March 1987. Agent Butler took notes during her meetings with Malik (Tr. 417), but she was unable to locate those notes when she returned to work after her leave (Tr. 417-418).[2] Petitioner's counsel questioned Butler at length about the misplaced notes (*id.* at 418-422). And counsel emphasized the lost notes in his argument to the jury in an attempt to cast doubt on the government's case (*id.* at 417-418). Petitioner's counsel, however, did not move to strike Malik's or Butler's testimony, nor did he move for a mistrial based on the government's failure to produce the notes at trial.

4. The court of appeals affirmed petitioner's convictions (Pet. App. 1a-9a). The court rejected petitioner's argument, first raised in the court of appeals, that the government failed to produce statements of witnesses as required by the Jencks Act, 18 U.S.C. 3500. The court observed that petitioner was given a copy of Malik's notes and that the government was not required to produce the originals (Pet. App. 7a). The court further held that the government was not required under the Jencks Act to preserve and turn over the rough notes made by Agent Butler (*ibid.*).

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[2] Another DEA agent had used Butler's notes to prepare a formal report on Malik's interviews (Tr. 415, 418-419). The government gave petitioner's counsel a copy of that report before trial.

The court of appeals also ruled that petitioner failed to show that an actual conflict of interest affected his lawyer's performance (Pet. App. 6a). And the court observed that "the redaction of the calendar to remove the name of counsel's son as a person to whom [petitioner] had loaned money removed any appearance of conflict" (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 15-16) that the government violated the Jencks Act by giving petitioner's counsel photocopies of Malik's notes rather than the original notes. As the court of appeals pointed out (Pet. App. 7a), however, petitioner's counsel did not request the original notes at trial. Moreover, nothing in the Jencks Act requires the government to produce original documents containing witness statements rather than accurate and clear photocopies.

Petitioner further asserts (Pet. 18) that the "government's failure to preserve the handwritten notes of agent Butler * * * is a violation of the Jencks Act." Petitioner, however, did not preserve that claim for appeal. The Jencks Act provides that after a witness has testified on direct examination, the court shall, on motion of the defendant, order the government to produce any statement of the witness in its possession that relates to the subject matter of the witness's testimony (18 U.S.C. 3500(b)). If the government does not comply with the court's order, the court "shall strike from the record the testimony of the witness" and, if necessary, declare a mistrial (18 U.S.C. 3500(d)). In this case, petitioner's counsel did not move for the production of Agent Butler's notes. Instead, counsel called the jury's attention to the loss of Butler's notes and sought to make "the most of the loss" of the notes "as casting doubt on the Government's case." *United States* v.

Miranda, 526 F.2d 1319, 1328 (2d Cir. 1975), cert. denied, 429 U.S. 821 (1976). Petitioner's counsel did not seek a mistrial nor did he ask the court to strike any witness's testimony. Accordingly, petitioner waived any claim that the government violated the Jencks Act by failing to produce Agent Butler's notes. See *United States* v. *McKenzie,* 768 F.2d 602, 607-608 (5th Cir. 1985), cert. denied, 474 U.S. 1086 (1986); *United States* v. *Petito,* 671 F.2d 68, 73-74 (2d Cir.), cert. denied, 459 U.S. 824 (1982), *United States* v. *Lyman,* 592 F.2d 496, 499 (9th Cir. 1978), cert. denied, 442 U.S. 931 (1979); *United States* v. *Peterson,* 524 F.2d 167, 175 (4th Cir. 1975), cert. denied, 423 U.S. 1088 (1976); *United States* v. *Washington,* 504 F.2d 346, 349 (8th Cir. 1974); *United States* v. *Spatuzza,* 331 F.2d 214, 218 (7th Cir.), cert. denied, 379 U.S. 829 (1964).[3]

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[3] There is authority for the proposition that agents must preserve their original notes of interviews with witnesses. See *United States* v. *Harris,* 543 F.2d 1247, 1253 (9th Cir. 1976); *United States* v. *Harrison,* 524 F.2d 421, 434-435 (D.C. Cir. 1975). The prevailing view, however, is that the Jencks Act does not require the production of an agent's rough notes of interviews once those notes have been "reduce[d] to formal reports" (*United States* v. *Gotchis,* 803 F.2d 74, 78 (2d Cir. 1986)). See *United States* v. *Hinton,* 719 F.2d 711 (4th Cir. 1983), cert. denied, 465 U.S. 1032 (1984); *United States* v. *Bastanipour,* 697 F.2d 170, 174 (7th Cir. 1982), cert. denied, 460 U.S. 1091 (1983); *United States* v. *Sanchez,* 635 F.2d 47, 66 n.20 (2d Cir. 1980); *United States* v. *Cole,* 634 F.2d 866, 868 (5th Cir.), cert. denied, 452 U.S. 918 (1981); see generally *Killian* v. *United States,* 368 U.S. 231, 241-242 (1961). Moreover, even the Ninth Circuit, which holds rough notes subject to production under the Jencks Act, has held that the Jencks Act is not violated when the notes are lost, as in this case, rather than destroyed as a matter of agency policy. See *United States* v. *Angelini,* 607 F.2d 1305, 1308 (9th Cir. 1979). Accordingly, even the courts that regard rough notes as being subject to the Jencks Act would not necessarily have found a violation in this case, even if the issue had been preserved. In any event, as we have noted, any conflict among the circuits on that issue is not presented in this case because petitioner waived any Jencks Act claim concerning Agent Butler's rough notes.

2. Petitioner next maintains (Pet. 18-29) that the district court did not conduct a sufficient inquiry into whether petitioner's counsel labored under a conflict of interest. It is settled that "the possibility of conflict is insufficient to impugn a criminal conviction. * * * [A] defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler* v. *Sullivan*, 446 U.S. 335, 350 (1980). Petitioner does not contend that the record shows such an actual adverse effect from a conflict. Instead, petitioner claims that his lawyer might have been influenced by a conflict of interest and thus the district court should have conducted an inquiry into the matter.

The record does not support petitioner's claim. The record shows that petitioner gave his counsel's son some money to buy audio equipment for petitioner. Counsel's son returned the money to petitioner without making any purchases. Petitioner's relationship with counsel's son was not relevant to any matter at issue in the trial. And the connection between petitioner and counsel's son was not made known to the jury. Petitioner does not dispute any of those facts. Nor could he explain to the district judge (who made several inquiries) how those facts could possibly have given rise to a conflict of interest. The prosecutor and petitioner's lawyer did not perceive any conflict. Accordingly, the district court was justified in finding that petitioner's counsel did not have a conflict of interest that impaired his representation of petitioner.

Petitioner cites *Wood* v. *Georgia*, 450 U.S. 261 (1981), and *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), for the proposition that a court must conduct an inquiry when a possible conflict of interest is brought to the court's attention. Here, the district court conducted such an inquiry. The district court ascertained the facts regarding petitioner's relationship with his lawyer's son. The court gave

petitioner the opportunity to explain why he thought those facts gave rise to a conflict of interest. And the court asked both parties' counsel whether they perceived any conflict. On the basis of the court's inquiry, the court found that petitioner's counsel did not have an actual conflict of interest that would affect his performance. The court of appeals, which reviewed the entire record, agreed with that assessment. Petitioner is not now entitled to another hearing on that issue.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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EDWARD S.G. DENNIS, JR.
Acting Assistant Attorney General
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SEPTEMBER 1988

[4] None of the court of appeals decisions cited by petitioner (Pet. 28-29) require a formal evidentiary hearing when, as here, the undisputed facts do not demonstrate any conflict of interest.

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